

1 ELLSWORTH, MOODY & BENNION  
2 KEEN L. ELLSWORTH, ESQ.  
3 Nevada State Bar #4981  
4 CHARLES W. BENNION, ESQ.  
5 Nevada State Bar #5582  
6 ANDREW D. SMITH, ESQ.  
7 Nevada State Bar #8890  
8 7881 W. Charleston Blvd., Ste. 210  
9 Las Vegas, Nevada 89117  
10 (702) 658-6100  
11 *Attorneys for Plaintiff*  
12 *Tom Collins*

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

TOM COLLINS, individually and as County  
Commissioner of Clark County, Nevada,

Plaintiff,

VS.

FISHER SAND & GRAVEL CO., a North Dakota corporation; LAS VEGAS PAVING CORPORATION, a Nevada corporation; and CLARK COUNTY NEVADA, a political subdivision of the State of Nevada,

## Defendants.

CASE: 2:09-cv-01931-RCJ-LRL

**PLAINTIFF TOM COLLINS'  
REPLY BRIEF IN SUPPORT  
OF THIS COURT'S  
JURISDICTION  
and  
OPPOSITION TO MOTION TO  
DISMISS**

COMES NOW the Plaintiff, TOM COLLINS, by and through his counsel of record, of the law firm ELLSWORTH, MOODY & BENNION, CHTD., and hereby submits this brief on the issue of this Court's jurisdiction to hear and grant relief on the causes of action plead in Plaintiff's complaint.

I. THE COURT FOUND JURISDICTION IN *FISHER I*. IT LOGICALLY AND LEGALLY FOLLOWS IT MUST HAVE JURISDICTION OVER *FISHER II*.

111

111

28

1                   **A. If the Court had Subject Matter Jurisdiction in Fisher I, it Follows**  
 2                   **that the Court Has Subject Matter Jurisdiction in Fisher II.**

3                   In *Fisher I*, both Las Vegas Paving and Clark County presented arguments against  
 4                   subject matter jurisdiction which were virtually identical to the arguments submitted in  
 5                   this case.

6                   The position of both Defendants in *Fisher I* was that Fisher Sand and Gravel did  
 7                   not have a protectable property or liberty interest under the 14<sup>th</sup> Amendment of the U.S.  
 8                   Constitution, nor under the U.S. Supreme Court's analysis of property rights in *Board*  
 9                   *of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972). They argued that under *Roth*,  
 10                  protectable property interests are "created and their dimensions are defined by existing  
 11                  rules or understandings that stem from an independent source such as state law-rules  
 12                  or understandings that secure..." such an interest. *Roth*, 408 U.S. at 8.

13                  The County further elaborated, citing to *Wedges/Ledges of Cal. v. City of*  
 14                  *Phoenix*, 24 F.3d 56 (9<sup>th</sup> Cir. 1994), "A reasonable expectation of entitlement is  
 15                  determined largely by the language of the statute and the extent to which the entitlement  
 16                  is couched in mandatory terms." *Id.* at 62. They also cited Supreme Court authority  
 17                  reiterating this very proposition. See *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 760  
 18                  (2005)(property interests arise only when the relevant state law provisions truly make  
 19                  the conferral of the benefit mandatory).

20                  The County clearly delineated that under Nevada law, no property right exists in  
 21                  bidding contracts as "[i]t is well settled in public contract award procedure that a Board's  
 22                  determination of a bidder's 'responsibility' is discretionary" and "is a factual question  
 23                  involving various considerations evaluated conjunctively." *Faust v. Donrey Media*  
 24                  *Group*, 95 Nev. 235, 237 (1979). They further argued that discretion afforded by statute  
 25                  was not so limited as to create a property interest in a public contract. See e.g. *Ferencz*  
 26                  *v. Hairston*, 119 F.3d 1244, 1247-48 (6<sup>th</sup> Cir. 1997)(the city's discretion in determining  
 27                  the 'best bid' provided sufficient grounds for finding no property interest to remain on



1 a bid list).

2 While the Court's basis for maintaining jurisdiction over Fisher Sand and Gravel's  
 3 claims in *Fisher I* is unclear, if the Court found jurisdiction on the basis that Fisher Sand  
 4 and Gravel had a protected property interest in a prospective public contract sufficient  
 5 to enter a writ against Commissioner Collins, then certainly under the same analysis the  
 6 Court has jurisdiction over the deprivation of Tom Collins' statutorily mandated rights  
 7 and duties as an elected official.

8 Unlike in the bidding process for public projects where commissioners have  
 9 discretion as to what constitutes the lowest 'responsible' bidder, absolutely no  
 10 government official possesses lawful discretion to compromise Tom Collins' vote without  
 11 his consent, absent a finding of wrongdoing, followed by strict adherence to statutory  
 12 procedure. Not even Tom Collins can lawfully abstain from voting without first  
 13 disclosing any potential conflicts of interest and subjecting them to scrutiny for  
 14 materiality. N.R.S. 281A.420(4) (public officials must disclose potential conflicts and  
 15 seek statutorily mandated advisory opinions from Ethics Commission before they  
 16 decided to abstain; *Nevada Commission on Ethics Opinion 99-56 (Woodbury)*(ruling  
 17 that N.R.S. 281A.420 establishes the disclosure, participation, and voting standards of  
 18 public officers in Nevada). In order to lawfully compromise Tom Collins' vote, the  
 19 County must follow statutorily mandated procedures. See e.g. N.R.S. 283.140  
 20 (impeachment procedure); N.R.S. 283.300 (accusation and trial); N.R.S. 306 (recall  
 21 procedure); N.R.S. 281A.420 (third-party complaints). The County failed to follow any  
 22 of these procedures.

23 Therefore, because the County has no lawful discretion to compromise Tom  
 24 Collins' vote, and Tom Collins has state-law-created rights and duties, one of the most  
 25 fundamental being his right and duty to vote, this Court should find Tom Collins has a  
 26 constitutionally protected property interest.

27 / / /

28



## **B. Ancillary and Pendant Jurisdiction**

2       *Fisher I* is already before this Court. The claims and issues in the present case,  
3 *Fisher II*, arise directly from the litigants' behavior, and this Court's resulting order, in  
4 *Fisher I*. In fact, the two cases are so intertwined that it appears difficult to hold a  
5 hearing on one without openly discussing the other.<sup>1</sup> Therefore this Court has ancillary  
6 jurisdiction pursuant to *Ortman v. Stanray Corp.*, 371 F.2d 154, 157 (7<sup>th</sup> Cir. 1967).

7 The two cases arise from “the same nucleus of operative facts,” and therefore, this  
8 Court has pendant jurisdiction pursuant to *Valerio v. Boise Cascade Corp.*, 645 F.2d  
9 699, 700 (9<sup>th</sup> Cir. 1981).

10 It would be manifestly unfair and inequitable for this Court to *accept* jurisdiction  
11 in *Fisher I*,<sup>2</sup> and issue a writ of mandamus preventing Commissioner Collins from voting  
12 on the Bid, and to then *refuse* jurisdiction in *Fisher II*, thereby denying Collins the  
13 opportunity to challenge the writ which the parties negotiated without his knowledge or  
14 consent. This result seems illogical, incongruous, and unjust.

15 Pendant and ancillary jurisdiction are not materially disputed, and this Court  
16 should accept jurisdiction on those grounds, if on no others. However, other compelling  
17 grounds for subject-matter jurisdiction *do* exist.

## II. STATE LAW GIVES COMMISSIONER COLLINS A PROPERTY RIGHT

20                   <sup>1</sup>See Minute Order (Docket #71) in ***Fisher I***, Case 2:09-cv-1372, which reads,  
21                   in relevant part, “MINUTES OF PROCEEDINGS - Status Conference held on  
22                   10/26/2009 before Judge Robert C. Jones. . . . The Court hears representations of  
23                   counsel as to status. ***Discussion is held with respect to the motion pending***  
24                   ***in case no. 2:09-cv-1931-RCJ-LRL for protective order regarding the***  
25                   ***deposition of Tom Collins. The Court advises that it intends to deny the***  
                 ***motion.*** Based on representations of counsel, however, the Court encourages  
                 plaintiff to postpone the deposition. Status conference adjourns. . . . (Entered:  
                 10/28/2009).” (Emphasis added.)

26       <sup>2</sup>The issue of jurisdiction was raised and extensively briefed in *Fisher I*, as  
27       noted above. However no order was filed issued regarding that motion. Given that  
     the Court eventually issued a writ of mandamus, it appears the Court found it had  
     jurisdiction in *Fisher I*.

1                   **A. State Law Defines the Protected Property Right**

2                   Nevada state law creates, and defines the dimensions of, Commissioner Collins'  
 3 interest in his office. NRS 244.016 creates the Board and the seven Commissioner  
 4 districts within it. Minimum qualifications are set forth in NRS 244.020. Section  
 5 244.030 creates a four-year term, while NRS 244.035 requires an elected Commissioner  
 6 to take the oath of office or else forfeit the seat. The powers of the elected Commissioners  
 7 are set forth in NRS 244.150 *et. seq.*

8                   Commissioner Collins explained, in his opening brief on jurisdiction, the state-law  
 9 processes that a County Commissioner must go through to recuse himself from voting;<sup>3</sup>  
 10 the state-law processes that anyone must follow to disqualify a Commissioner from  
 11 voting;<sup>4</sup> the role and state statutory jurisdiction of the Nevada Ethics Commission in  
 12 disqualifying a County Commissioner from a vote;<sup>5</sup> the state-law basis for recall,<sup>6</sup>  
 13 removal for misconduct,<sup>7</sup> and impeachment;<sup>8</sup> and the state-law basis for resignation.<sup>9</sup>

14                   These statutes and processes were cited to show the state-law creation and  
 15 boundaries of Collins' interest in the office of County Commissioner.

16                   “Property interests, of course, are not created by the Constitution. Rather  
 17 they are created and their dimensions are defined by existing rules or  
 18 understandings that stem from an independent source such as state  
 law-rules or understandings that secure certain benefits and that support  
 claims of entitlement to those benefits.” *Roth* at 577.

19                   Nevada law creates the office, defines who can hold it, and it defines how and

---

21                   <sup>3</sup>NRS Chapter 281A.

22                   <sup>4</sup>NRS Chapter 281A.

23                   <sup>5</sup>NRS Chapter 281A.

24                   <sup>6</sup>NRS Chapter 306.

25                   <sup>7</sup>NRS Chapter 283.

26                   <sup>8</sup>NRS Chapter 283.

27                   <sup>9</sup>NRS Chapter 283.



1 when the office holder can be removed. This perfectly fits the *Roth* definition of a state-  
 2 law property interest. This Court must find that Tom Collins has a right to the office  
 3 during his term, subject to state-law provisions for recusal, disqualification, and removal  
 4 from office.

5 **B. This Court Must Distinguish Cases Dealing With Candidacy,  
 6 Redistricting, and a Sitting Official in an Unmodified Term**

7 Numerous cases have been cited on the issue of whether someone has a right to  
 8 elected office. Generally, they fall into three broad categories: those dealing with  
 9 candidacy for office, those dealing with redistricting or the elimination of an office which  
 10 ends someone's term in office, and those dealing with a sitting official whose office  
 11 remains unchanged. The first two types of cases are factually quite distinct from the  
 12 present case, inasmuch as in the present case, state law applied to these facts creates the  
 13 property right. *See Roth* at 577.

14 **1. Candidacy**

15 "There is no constitutional right to be elected to a particular office." *Parks v. City*  
 16 *of Horseshoe Bend, Arkansas*, 480 F.3d 837, 840 (8<sup>th</sup> Cir. 2007).

17 Cases such as *Taylor v. Beckham*, 178 U.S. 548, 20 S.Ct. 1009 (1900), and  
 18 *Snowden v. Hughes*, 321 U.S. 1, 64 S.Ct. 397 (1944), dealt with candidates for office  
 19 jostling to be declared the winners of their elections. **In that context**, the Supreme  
 20 Court stated that, "an unlawful denial by state action of a right to state political office is  
 21 not a denial of a right of property or of liberty secured by the due process clause."  
 22 *Snowden* at 7.

23 The Courts in *Taylor* and *Snowden* clearly wanted to let voters decide elections.  
 24 They did not permit losing candidates to use the 14<sup>th</sup> Amendment's due process clause  
 25 as a tool to substitute the court's judgment for that of the voters.<sup>10</sup> The *Taylor* court, for  
 26

---

27 <sup>10</sup>These principles are interesting given the plaintiff's plea for relief in *Fisher I*.  
 28 The *Fisher I* plaintiff seeks to have the court award it the Bid instead of Las Vegas



1 example, recognized that *some harm* would occur if the voters' choice were deprived of  
 2 office under state law:

3 "It cannot be doubted that ***the certificate [of election] awarded to Taylor established at least his prima facie right to the governorship***, and that he could not be deprived of that right except upon a contest in the mode prescribed by law, and upon proof showing that Goebel was legally entitled to the office. ***To deprive him of that right illegally was an injury both to him and to the people of the state.*** 'The very essence of civil liberty,' it was said in *Marbury v. Madison*, 1 Cranch, 137, 2 L. ed. 60, 'is the right of every individual to claim the protection of the laws, whenever he receives an injury.'" *Taylor* at 585 (*emphasis added*).

9 The Taylor court ultimately permitted state law to decide the election, which  
 10 awarded the governorship to Goebel *under due process of state law*. But these early  
 11 candidacy cases teach us that state law should govern elections, and, once elected, a  
 12 certificate of election creates at least a *prima facie* right to office.<sup>11</sup>

13 Roth did not directly overrule the holdings of *Taylor* and *Snowden*. But it opened  
 14 the door for expanded analysis of what constitutes a "property interest." Whereas *Taylor*  
 15 (decided 1900) and *Snowden* (decided 1944) stated directly that there was no property  
 16 right [to be elected to] public office, *Roth* (decided 1972) established a test to determine  
 17 what might constitute a "property right." *See Roth* quote, 5:6-8 *supra*. This test from the  
 18 more recent Supreme Court case permits Collins to define his interest in his office as a  
 19 "property right" under state law.

20 The present is factually and legally distinguishable from the candidacy cases, at  
 21 least to the extent that they held no property rights existed. Commissioner Collins was  
 22 a mere candidate before the voters of Clark County elected him. He was elected, he  
 23 received a certificate of election from the state, he took the oath of office, and he was  
 24 sworn in. No one is arguing that he actually lost the election under state law; rather, the

---

25  
 26 Paving. *See* First Amended Verified Complaint (Docket #14) in Case No. 2:09-cv-  
 1372, page 22 lines 4-5 (prayer for relief #2).

27  
 28 <sup>11</sup>Tom Collins was issued a certificate of election in 2008.

1 Defendants are arguing that he has no right to perform his duties while in office. This  
 2 position is incorrect. Once elected, state law is extremely clear as to his rights and  
 3 responsibilities. It is clear enough, in fact, to create a limited property interest, as noted  
 4 in *Taylor*, which referred to the removal of an elected governor without due process as  
 5 the deprivation of a right. *Taylor* at 585.

6 Under *Roth*, Commissioner Collins has a property interest in his office during its  
 7 term, subject to the state-law procedures for recusal, disqualification, removal, and  
 8 resignation.

9 Simply stated, Tom Collins has an interest that is factually more definite and  
 10 quantifiable than the *Taylor* or *Snowden* plaintiffs.

11 **2. Elimination of Office During Term**

12 Another set of cases deal with redistricting, merging offices, and eliminating  
 13 offices which were created under state law. *See, e.g., Wolf v. Larson*, 897 F.2d 1409, (7<sup>th</sup>  
 14 Cir. 1990). In *Wolf*, plaintiff was elected to serve a term as the “village collector.” The  
 15 office was created pursuant to a village ordinance. Midway through her term, the village  
 16 abolished her position. Wolf sued for deprivation of her property interest without due  
 17 process. *Id.* at 1410.

18 State law created the office to which Wolf was elected. If a change in state law  
 19 eliminated the office before Wolf’s term expired, she has little factual basis to complain.  
 20 The change in state law changes the premise of her right. When the state chooses to  
 21 redistrict, merge, and/or eliminate certain offices, the very law giving rise to the property  
 22 interest has changed. The *Roth* holding cannot help a displaced official under these  
 23 circumstances. State law processes determine whether such changes are permissible. No  
 24 individual may stop the state from organizing itself as it chooses, subject to applicable  
 25 statutes and constitutions.

26 Commissioner Collins is not trying to protect his office from elimination.  
 27 Commissioner Collins simply seeks to protect his right to do the job he was elected to do,  
 28



1 so long as he holds the office.

2 **3. Sitting Official Whose Office Remains Unchanged**

3 This brings us to our third type of case. In these cases, an elected official is sitting  
 4 in his office, the nature and existence of which remains unchanged. *Gordon v.*  
 5 *Leatherman*, 450 F. 2d 562 (5<sup>th</sup> Cir. 1971) and *Crowe v. Lucas*, 595 F.2d 985 (5<sup>th</sup> Cir.  
 6 1979) are examples of this. These cases are factually similar to ours. And in these cases,  
 7 courts have found that the elected official has a property interest in the office, subject to  
 8 the limitations of state law – such as term of years, term limits, impeachment, etc...

9 The *Gordon* case is especially instructive here, because the facts are conceptually  
 10 similar. In *Gordon*, the plaintiff was a county commissioner of Dade County, Florida.  
 11 Gordon sued to challenge the validity of a recall election under state law. *Gordon*. at 563-  
 12 564. Although the 5<sup>th</sup> Circuit Court eventually held that the recall election was valid  
 13 under Florida state law, *Id.* at 567, , it clearly found that the plaintiff had a property  
 14 interest in his office, subject to state-law limitations:

15 “The district court in granting declaratory and injunctive relief first  
 16 reasoned that ***plaintiff, as an elected official, has a property***  
 17 ***right in his office which cannot be taken away except by due***  
 18 ***process of law.***’ That statement is correct so far as it goes. But it is also  
 19 true that an official takes his office subject to the conditions imposed by  
 20 the terms and nature of the political system in which he operates. The  
 21 question then becomes whether there is any constitutional infirmity in  
 22 [the state statute at issue] as comprising part of that system.” *Gordon v.*  
 23 *Leatherman*, 450 F.2d 562, 565 (5th Cir. 1972) (*emphasis added*).

24 Nevada law protects Commissioner Collins to a greater degree, in this situation,  
 25 than Florida law protected Commissioner Gordon. As we have explained, Commissioner  
 26 Collins cannot recuse himself without a public evaluation of the materiality of his  
 27 grounds for recusal, and he cannot be disqualified from voting unless the Ethics  
 28 Commission’s procedures are followed. Neither of these state procedures were followed  
 prior to the writ of mandamus being issued in *Fisher I*.

26 / / /

27 / / /



1     **C. The Defendants Fail to Recognize the Distinction Between Cases**  
 2         **involving Rights to Candidacy, Elimination of Office During Term, and**  
 3         **Sitting Officials Whose Offices Have Not Changed**

4             The Defendants have failed to recognize the distinctions between cases involving  
 5         rights to candidacy, elimination of office mid-term, and sitting officials whose offices  
 6         have not changed. The resulting effect is that the County has amassed a tremendous soup  
 7         of string cites to cases where courts allegedly failed to find protected property rights, but  
 8         Defendants provide little regard to the reasons why. To demonstrate this confusion, the  
 9         County cites to a plethora of cases which allegedly support their argument against Tom  
 10         Collins having a property right, yet many of the cases they cite to contradict *Snowden*  
 11         and *Taylor*, and in some cases, even the County's own parentheticals.

12             A perfect example of the above is the County's use of *Harris County*  
 13         *Commissioners Court v. Moore*, 420 US 564 (1972). In their brief the County said  
 14         concerning *Harris*, "Despite state procedures for notice and trial, the Court directed the  
 15         trial court to dismiss the complaint for alleged equal protection and due process  
 16         violations."

17             While that sentence alone is true, the reasoning behind the *Harris* court's actions  
 18         actually demonstrate an inclination toward *Roth*. In *Harris*, the court abstained and  
 19         dismissed the case without prejudice to preserve the appellant's due process claims on  
 20         appeal "pending determination of the state law questions that pervade this case." *Id.* at  
 21         82.

22             Explaining their decision to abstain and remand for dismissal without prejudice,  
 23         the *Harris* Court stated, "In short, not only the character of the federal right in this case,  
 24         but even the availability of the relief sought turn in large part on the same unsettled  
 25         state-law questions. Because the federal claim in this case is 'entangled in a skein of state  
 26         law that must be untangled before the federal case can proceed,' *McNees v. Board of*  
 27         *Education*, 373 U. S. 668, 373 U. S. 674 (1963), we conclude that the District Court erred

28



attorneys at law

1 in not adopting appellants' suggestion to abstain."<sup>12</sup> The *Harris* Court did not remand  
2 for dismissal because there was no property interest as claimed by the County, but only  
3 because questions of state law needed to be resolved before the Court could take  
4 jurisdiction over their claims. Not surprisingly, a simple reading of the relevant case law  
5 reveals strong factual distinctions between cases which follow *Roth* and those that do  
6 not.

### III. COLLINS WAS NOT REQUIRED TO INTERVENE IN *FISHER I*.

8 It has been argued that Commissioner Collins has waived his rights and objections  
9 by not appearing and intervening in *Fisher I*. This is not correct; it was Plaintiff's burden  
10 to compel his participation in that case.

11 The United States Supreme Court case of *Martin v. Wilks*, 490 U.S. 755, 109 S.Ct.  
12 2180, 104 L.Ed.2d 835 (1988), held:

13       “Joinder as a party, rather than knowledge of a lawsuit and an opportunity  
14       to intervene, is the method by which potential parties are subjected to the  
15       jurisdiction of the court and bound by a judgment or decree. The parties  
16       to a lawsuit presumably know better than anyone else the nature and scope  
17       of relief sought in the action, and at whose expense such relief might be  
      granted. ***It makes sense, therefore, to place on them a burden of  
      bringing in additional parties where such a step is indicated,  
      rather than placing on potential additional parties a duty to  
      intervene when they acquire knowledge of the lawsuit.*** Gladys  
      Baker at 553 (emphasis added).

19 The Supreme Court has also noted the general consensus, “in Anglo-American  
20 jurisprudence that one is not bound by a judgment in personam in a litigation in which  
21 he is not designated as a party or to which he has not been made a party by service of  
22 process’ . . . This rule is part of our ‘deep-rooted historic tradition that everyone should  
23 have his day in court.’ As a consequence, ‘[a] judgment or decree among parties to a  
24 lawsuit resolves issues among them, but does not conclude the rights of strangers to

<sup>26</sup> <sup>12</sup>Another Case the County cited which turned on questions of state law is *Wolf v. Larson*, 897 F.2d 1409, 1411-13 (7<sup>th</sup> Cir. 1990)(due process was not violated because it appeared state constitutionally-mandated procedure was followed);

1 those proceedings.”<sup>13</sup>

2 If the plaintiff in *Fisher I* wanted to bind Commissioner Collins to a different set  
 3 of restrictions than the other county commissioners, it should have made him an  
 4 individual party to the case. It did not.

5 **IV. COLLINS HAS A PROTECTED LIBERTY INTEREST IN HIS VOTE**

6 Commissioner Collins has more than a protected property interest in his office  
 7 and his vote. He also has a liberty interest which is protected by the 14<sup>th</sup> Amendment  
 8 against deprivation without due process.

9 In 1989 the First Circuit declared that it is considered unassailable that an elected  
 10 official’s right to vote falls under the first amendment’s freedom of speech guarantee:

11 “Although we have found no case directly on point, probably because it is  
 12 considered unassailable, **we have no difficulty in finding that the act**  
 13 **of voting on public issues by a member of a public agency or**  
 14 **board comes within the freedom of speech guarantee of the first**  
**amendment.** This is especially true when the agency members are  
 elected officials.” *Miller v. Town of Hull*, 878 F.2d 523, 532 (1<sup>st</sup>  
 Cir.)(emphasis added).

15 That same year, the D.C. Circuit cited *Miller*, reaffirming, “A legislator’s vote is  
 16 inherently expressive. This so, moreover, not simply because the act of voting requires  
 17 a verbal utterance.” *Clark v. U.S.*, 886 F.2d 404, 411 (D.C. Cir. 1989) *vacated as moot*,  
 18 915 F.2d 699(D.C. Cir. 1990).

19 Voting, as the Supreme Court has recognized, is the “individual and collective  
 20 **expression of opinion** within the legislative process.” *Id.* quoting *Hutchison v.*  
 21 *Proxmire*, 443 U.S. 111, 133, 99 S.Ct. 2675, 2697, 61 L.Ed.2d 411 (1978)(emphasis added  
 22 by *Clarke*). Voting serves the function not only of mechanically disposing of proposed  
 23 legislation, but of registering the “will, preference, or choice,” of an individual legislator  
 24 on an issue of concern to the political community. *Clarke* at 411, quoting *Montero v.*  
 25 *Meyer*, 861 F.2d 603, 607 (10<sup>th</sup> Cir. 1988)(quoting BLACK’S LAW DICTIONARY 1414

26 \_\_\_\_\_

27 <sup>13</sup>Richards v. Jefferson County, 517 U.S. 793, 798, 116 S.Ct. 1761, 135 L.Ed.2d 76  
 28 (1996)(citations omitted).

1 (5<sup>th</sup> ed. 1979)), cert. denied, 492 U.S. 921, 109 S.Ct. 3249, 106 L.Ed.2d 595 (1989). For  
 2 this reason, a legislator's voting record is "the best indication of their position on specific  
 3 issues and his or her ideological persuasions." *Clarke* quoting M. Barone & G. Ujifusa,  
 4 THE ALMANAC OF AMERICAN POLITICS 1988 viii (1988).

5 Tom Collins is an elected member of a public board. His vote constitutes free  
 6 speech in the political arena. Free speech is protected by the 1<sup>st</sup> Amendment to the U.S.  
 7 Constitution. Free speech is also a liberty interest which is protected by the 14<sup>th</sup>  
 8 Amendment. *See, e.g. Roth* at 575. Therefore the County's action to deny Commissioner  
 9 Collins from voting on the Bid constitutes the denial of a liberty interest, and thus a  
 10 violation of his due process rights.

11 **V. CONCLUSION**

12 For the reasons stated above, Plaintiff Tom Collins requests that this Court find  
 13 federal question, pendant, and ancillary jurisdiction in this case. The Defendants' motion  
 14 to dismiss must be denied.

15 DATED this 30<sup>th</sup> day of October, 2009.

16 ELLSWORTH, MOODY & BENNION

17  
 18 By: /s/ Andrew D. Smith  
 19 Andrew D. Smith, Esq.  
 20 Nevada Bar No. 8890  
 21 7881 W. Charleston Blvd., Suite 210  
 22 Las Vegas, NV 89117  
 23 Tel: (702) 658-6100  
 24 *Attorneys for the Plaintiff*



**CERTIFICATE OF SERVICE**

I hereby certify that I am over the age of eighteen years and I am an employee of ELLSWORTH, MOODY & BENNION. On the 30<sup>th</sup> day of October, 2009, a true and correct copy of the foregoing PLAINTIFF TOM COLLINS' REPLY BRIEF IN SUPPORT OF THIS COURT'S JURISDICTION and OPPOSITION TO MOTION TO DISMISS, Expedited Review Requested, was sent to all interested parties, via CM/ECF electronic transmission, addressed as follows:

8 Stanley W. Parry, Esq.  
BALLARD SPAHR  
9 100 City Pkwy., Suite 1750  
Las Vegas, NV 89106-4617  
10 [parrys@ballardspahr.com](mailto:parrys@ballardspahr.com)  
[gradyc@ballardspahr.com](mailto:gradyc@ballardspahr.com)  
[waltons@ballardspahr.com](mailto:waltons@ballardspahr.com)  
11 *Attorney for Defendant Fisher Sand &*  
12 *Gravel*

Gwen Rutar Mullins, Esq.  
Wade B. Gochnour, Esq.  
HOWARD & HOWARD ATTORNEYS  
PLLC  
3800 Howard Hughes Parkway, Suite  
1400  
Las Vegas, NV 89169  
[GRM@h2law.com](mailto:GRM@h2law.com)  
[gwenm@cox.net](mailto:gwenm@cox.net)  
[kdp@h2law.com](mailto:kdp@h2law.com)  
[wbg@h2law.com](mailto:wbg@h2law.com)  
*Attorneys for Defendant Las Vegas*

14 J. Colby Williams, Esq.  
15 CAMPBELL & WILLIAMS  
16 700 S. Seventh Street  
17 Las Vegas, NV 89101  
[jcw@campbellandwilliams.com](mailto:jcw@campbellandwilliams.com)  
17 *Attorneys for Defendant Clark County,  
Nevada*

Attorneys for Defendant Las Vegas  
Paving

/s/ Andrew D. Smith  
Employee of ELLSWORTH, MOODY & BENNION